91-1432

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Petitioner,

—against—

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 9, 1992

QUESTIONS PRESENTED

1. May a federal court fashion a procedural rule which permits the prejudgment attachment of a foreign state's assets in the absence of the foreign state's explicit waiver of its immunity from such attachment required by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(d)?

2. Is a district court order denying a foreign state's claim to immunity from prejudgment attachment immediately appealable under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

PARTIES TO THE PROCEEDING

Petitioner in the district court action, which was the appellee in the Court of Appeals for the Second Circuit, was Caribbean Trading and Fidelity Corporation.

Respondent in the district court action, which was the appellant in the Court of Appeals for the Second Circuit, was Nigerian National Petroleum Corporation.

STATEMENT PURSUANT TO RULE 29.1

Petitioner Nigerian National Petroleum Corporation is a statutory corporation constituted pursuant to the Nigerian National Petroleum Corporation Decree No. 33 of 1977. It is owned entirely by the Government of Nigeria and has no parent or subsidiary corporation within the meaning of Supreme Court Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nigerian National Petroleum Corporation ("NNPC") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals in this case is reported at 948 F.2d 111 (2d Cir. 1991), the text of which is contained in the Appendix at A-1.[1] The opinions of the district court, dated December 18, 1990 and April 17, 1991, are not

1 References to the Appendix to this Petition are in the form "A-_____".

reported; the text of these opinions is contained in the Appendix at A-12, and A-26, respectively.

JURISDICTION

The opinion and order of the court of appeals was entered on October 30, 1991. Petitioner filed a timely petition for rehearing and suggestion for rehearing *in banc*, which the court of appeals denied on December 9, 1991. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Sections 1603(a), 1603(b), 1609 and 1610(d)(1) of the Foreign Sovereign Immunities Act; Civil Rule 3(j) of the Local Rules of the Southern District of New York; Rule 59(e) of the Federal Rules of Civil Procedure; Article VI of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 3 U.S.T. 2517, T.I.A.S. 6997, *codified at* 9 U.S.C. §§ 201 *et seq.* (1970); and 28 U.S.C. § 1291. The full texts of these provisions are contained in the Appendix at A-46-50.

STATEMENT OF THE CASE

Introduction

This petition presents the questions of whether a United States district court may order prejudgment attachment of a foreign state's assets notwithstanding the fact that the foreign state did not explicitly waive its immunity from such attachment under the terms of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(d), and whether such an order is immediately appealable.

The district court in this case initially ordered NNPC, a foreign state, to post prejudgment security in excess of

$10 million and refused to consider NNPC's claim that the order was prohibited by the FSIA, which grants foreign states immunity from prejudgment attachment unless there is an explicit waiver of that immunity. The district court rested its decision on Civil Rule 3(j) of the Local Rules of the Southern District of New York, which has been interpreted as precluding determination of issues raised for the first time on a motion for reconsideration. (A-28,30)

The Court of Appeals for the Second Circuit assumed that the district court order constituted a prejudgment attachment within the meaning of the FSIA, and recognized that NNPC had not explicitly waived its immunity from such attachment under the terms of the FSIA. Nevertheless, the Second Circuit upheld the district court's order, ruling that unless a foreign state asserts its immunity "in its initial response to the opposing party's requests for an order of attachment", its immunity is lost. (A-8) The apparent rationale for the Second Circuit's holding is that the new rule it has fashioned "imposes orderly procedures" upon the assertion of immunity by a foreign state. (A-8) Further, the Court of Appeals held that the district court order was not immediately appealable, and treated the appeal as a petition for writ of mandamus, applying the strict "usurpation of judicial power" standard in deciding the appeal. (A-7)

This Court has never addressed the issue of foreign state immunity from prejudgment attachment under the FSIA, or the appealability of an order denying such immunity. However, this Court has recognized the important foreign policy interests embodied in the FSIA, and has repeatedly approved immediate appellate review of district court orders denying claims of immunity in many contexts. Other than the decision below, no circuit court has ever held that a foreign state's immunity from prejudgment attachment may be forfeited in the absence of an explicit waiver of the immunity. The only other circuit court which has addressed the FSIA's prejudgment attachment immunity provision is the Fifth Circuit, which held—contrary to the Second Circuit's decision here—that the immunity cannot be lost unless a foreign state explic-

itly waives it. In addition, five circuit courts—the Fifth, Sixth, Seventh, Ninth, and District of Columbia Circuits—have determined that denials of claims to jurisdictional immunity or immunity from postjudgment attachment under the FSIA are entitled to immediate appellate review.

The Second Circuit's decision directly contradicts the express terms of the FSIA, disregards this Court's teachings on both appealability and the FSIA, and creates a conflict among the circuit courts. Accordingly, there is a compelling need for this Court to grant certiorari and issue a clear pronouncement on both the immunity and appealability issues in this case.

FACTUAL SUMMARY

NNPC is a statutory corporation existing under Nigerian law and owned entirely by the government of Nigeria. It is charged with essentially all activities relating to the Nigerian petroleum industry. Thus, NNPC is "an agency or instrumentality of a foreign state," and a "foreign state" for purposes of the FSIA. 28 U.S.C. §§ 1603(a),(b). (A-3,46)

In June 1990, respondent Caribbean Trading and Fidelity Corporation ("CTFC") brought an action against NNPC in the United States District Court for the Southern District of New York (the "New York action"), pursuant to the United Nations Convention on the Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 3 U.S.T. 2517, T.I.A.S. 6997, *codified at* 9 U.S.C. §§ 201 *et seq.* (1970) (the "Convention"). In the New York action, CTFC sought to confirm and enforce an arbitration award in excess of $10 million which it obtained against NNPC in Nigeria. The subject of the Nigerian arbitration was a long-term crude oil sales contract entered into in 1985 by NNPC and the government of St. Christopher and Nevis ("St. Kitts"), with CTFC acting as agent for St. Kitts.

At or about the same time that CTFC brought the New York action, NNPC commenced proceedings before the High

Court of Lagos State in Lagos, Nigeria (the "Lagos action") to set aside the arbitral award under Nigerian law. NNPC attacked the award on various grounds, including the fact that CTFC was not a party to, and thus derived no rights under, NNPC's crude oil sales contract with St. Kitts or the arbitration agreement contained therein.

The Decisions Below

In October 1990, NNPC moved to dismiss the New York action, arguing, *inter alia*, that the district court lacked both subject matter and personal jurisdiction over NNPC under the FSIA and that, even if jurisdiction were found to exist, recognition of the arbitral award should be denied under Article V of the Convention. In addition, NNPC argued that, if the court were to determine that subject matter and personal jurisdiction existed under the FSIA, and that NNPC's defenses under the Convention were not meritorious, the action should then be stayed pursuant to Article VI of the Convention pending a decision by the Nigerian court on NNPC's application to set aside the award.[2]

On December 18, 1990, the district court issued an Opinion and Order staying the New York action pending the outcome of the Lagos proceedings. (A-12) The district court made it quite clear that there was substantial merit in NNPC's challenges to jurisdiction under the FSIA and that it had serious concerns about confirming the purported award. (A-18-22) Nevertheless, the district court reserved decision on NNPC's motion to dismiss the action for lack of subject matter and personal jurisdiction and on the substantive defenses raised by NNPC to confirmation under Article V of the Convention. In granting the stay, however, the district court ordered

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2 One of the substantive defenses to enforcement of an arbitral award under the Convention is that the award has been set aside by the courts of the country in which it was rendered. Therefore, Article VI of the Convention provides for a stay of an enforcement action pending the outcome of proceedings in the country of origin to set aside the arbitral award.

NNPC to post security in the amount of the arbitral award, that is, $10,255,728.80. (A-25)

On December 28, 1990, NNPC moved, pursuant to Fed. R. Civ. P. 59(e), for reconsideration and amendment of the district court's Opinion and Order, stressing that the question of a stay under the Convention should not have been reached unless and until the court determined that it had jurisdiction (which appeared highly unlikely in view of the court's analysis of the jurisdictional issue in its December 18 Opinion). In addition, NNPC asserted that the order requiring it to post security violated the terms of the FSIA, which prohibits prejudgment restraints on the assets of a foreign state absent the foreign state's express consent. 28 U.S.C. §§ 1609, 1610(d).

On April 17, 1991, the district court denied NNPC's motion for reconsideration. (A-26) The only reason stated by the district court for denying NNPC's assertion of immunity from prejudgment attachment was that the issue was raised for the first time on the motion for reconsideration. The court did not address the provisions of the FSIA, 28 U.S.C. § 1610(d), and based its decision solely on Civil Rule 3(j) of the Local Rules of the United States District Court for the Southern District of New York. (A-28,30)

NNPC appealed the district court's order in the Court of Appeals for the Second Circuit, which stayed the effect of the order pending NNPC's appeal. On October 30, 1991, the Second Circuit dismissed NNPC's appeal for lack of jurisdiction and, treating the appeal as a petition for writ of mandamus, denied the petition.

On the issue of appellate jurisdiction, the Second Circuit divided in holding that the district court order denying NNPC's claim of immunity from prejudgment attachment was not immediately appealable under the collateral order doctrine established by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. The majority declined to follow the decisions of this Court and several circuit courts which have held that denials of immunity claims are entitled to immediate appellate review

under *Cohen*. Instead, the Second Circuit reasoned that, because NNPC's security could be "repaid with interest", no irreparable harm would result from the lack of immediate appellate review. (A-5) The concurring opinion disagreed on this issue, and would have found appellate jurisdiction of the district court order under *Cohen*. (A-10-11) However, the majority went on to treat NNPC's appeal as a petition for a writ of mandamus and thus addressed the merits of NNPC's position. (A-7-8)

On the issue of prejudgment attachment immunity under the FSIA, the Second Circuit assumed that the district court order constituted a prejudgment attachment within the meaning of the FSIA, and recognized that NNPC had done nothing that would qualify as an "explicit waiver" of its immunity. (A-6,10-11) Nevertheless, the Second Circuit upheld the district court order, establishing a new procedural rule which requires a foreign state to invoke its immunity "in its initial response to the opposing party's requests for an order of attachment". (A-8) Since NNPC had not raised § 1609 at the first procedural juncture, which would have been its reply to CTFC's opposition to the motion to dismiss, the district court was free to "reject as untimely" NNPC's assertion of immunity under the FSIA, and to order prejudgment attachment of NNPC's assets. (A-8)

NNPC timely filed a petition in the Second Circuit for rehearing and suggestion for rehearing in banc, which was denied on December 9, 1991. (A-32) NNPC then moved the Second Circuit for a stay of its mandate pending NNPC's appeal to the Supreme Court, which was denied on December 20, 1991. (A-40) On January 6, 1992, NNPC filed an application to Justice Clarence Thomas to stay the Second Circuit's mandate pending certiorari, which application was denied on January 7, 1992. (A-43)

In the absence of a stay of the Second Circuit's mandate pending review by this Court, NNPC chose to post security rather than violate the district court order. A hearing was held in the district court on January 21, 1992, regarding what

form of security NNPC would be required to post. The court ordered NNPC to provide cash in the amount of $10,255,728.80 or a surety bond in the amount of $12 million to cover interest on a potential judgment. (A-44) Accordingly, NNPC complied with the district court's order and, on February 3, 1992, posted a $12 million surety bond in the district court. Thus, there is presently a continuing prejudgment restraint on assets of NNPC.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision in this case is an unprecedented departure from the express terms of the FSIA, disregards this Court's teachings on the vital policy interests reflected in the FSIA and the deference owed to its provisions, and conflicts with the decisions of other circuits on both appealability and prejudgment attachment under the FSIA.

On the issue of prejudgment attachment, the Second Circuit's decision simply disregards the FSIA's explicit waiver requirement—a provision specifically enacted by Congress in order to prevent serious frictions in United States foreign relations caused when this country's courts attach foreign state assets before a judgment on the merits has been made. The vital foreign policy interests embodied in the FSIA have been recognized by this Court, which has held that the FSIA prescribes the exclusive rules and procedures governing suits against foreign states in United States courts. Further, the Second Circuit's decision conflicts with the Fifth Circuit's decision in *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro S.A.*, 875 F.2d 1174 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990). In *Atwood*, the Fifth Circuit strictly adhered to the terms of the FSIA and required proof of an explicit waiver of prejudgment attachment immunity by the foreign state before permitting the district court to order prejudgment restraint of assets.

On the appealability question, this Court has never considered the precise issue whether the denial of a claim of immunity from prejudgment attachment under the FSIA is immediately appealable under *Cohen*. However, this Court has found *Cohen* applicable in cases involving denials of many other types of immunity, including immunity from suit and double jeopardy. In accordance with this Court's *Cohen* line of cases, every circuit court that has considered the appealability of immunity claims under the FSIA—the Fifth, Sixth, Seventh, Ninth, and District of Columbia Circuits—has held that a district court's denial of FSIA immunity claims is immediately appealable under *Cohen*. While no court has specifically considered the appealability of a prejudgment attachment immunity claim, the underlying principles are the same: that is, there can be no effective appellate review of a denial of a claim to immunity from judicial process if that review must await termination of the judicial process from which immunity is claimed.

This Court should grant certiorari in order to resolve the split in authority created by the Second Circuit's decision and to restore uniformity in the application of the immunity provisions of the FSIA.

I. The Second Circuit's Decision on Prejudgment Attachment Immunity Violates the Express Terms of the FSIA and Creates a Conflict In the Circuit Courts

A. The Second Circuit's New Procedural Rule Contradicts the FSIA's Explicit Waiver Requirement

In the FSIA, Congress granted to foreign states immunity from prejudgment attachment in actions brought against them in United States courts and divested the courts of any authority to grant such provisional relief unless there was an "explicit" waiver of that immunity by the foreign state. 28 U.S.C. § 1609, 1610(d).

These provisions were prompted by the bitter history of litigation against foreign states in United States courts, in which foreign assets were attached as a means of acquiring

jurisdiction before any adjudication of the merits of a claim. By enacting a comprehensive scheme in the FSIA for acquiring *in personam* jurisdiction over foreign states, Congress eliminated the need to use prejudgment attachment for jurisdictional purposes, and thereby avoided the serious adverse foreign relations consequences previously encountered. *See* Restatement (Third) of the Foreign Relations Law of the United States § 460 cmt. a (1987).

As the legislative history makes clear:

> The [FSIA] *does away with prejudgment attachment*. First . . . it is no longer necessary as a means of securing jurisdiction, given the broad *in personam* jurisdiction conferred. Second, attachment for security purposes has been eliminated as a troublesome and embarrassing friction causing factor in diplomatic relations. This conclusion is buttressed by the premise that most foreign states will pay their judgments in any event.[3]

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 11315, 94th Cong., 2d Sess. 76 (1976) (emphasis supplied).

By requiring an explicit waiver, Congress treated the prejudgment attachment immunity differently from jurisdictional immunity or immunity from postjudgment attachment—which may be waived "implicitly" by conduct—so as to preclude any inadvertent, implied or constructive waiver by the foreign state. The drafters of the FSIA contemplated that an *implicit* waiver of immunity from personal jurisdiction could result from the failure to raise that immunity in a first "responsive pleading". House Comm. on the Judiciary, Section-by-Section Analysis of the Foreign Sovereign Immunities Act, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18,

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3 It should be noted that in this case there has never been any showing, or even the suggestion, that NNPC could not or would not satisfy any potential judgment.

reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6617. However, by imposing a higher standard as to prejudgment attachment—the "explicit" waiver standard—it is clear that even procedural defaults cannot abrogate that immunity.

In the case at bar, the Second Circuit assumed that the district court order constituted a prejudgment attachment within the meaning of the FSIA, 28 U.S.C. § 1610(d). (A-6,10). This assumption is consistent with controlling precedent in the Second Circuit, which has recognized that any prejudgment restraint or encumbrance on the use of a foreign state's property constitutes a prejudgment attachment which is prohibited by the FSIA. *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir.), *cert. denied*, 464 U.S. 850 (1983). Further, the Second Circuit did not find that NNPC had explicitly waived its immunity from prejudgment attachment pursuant to the terms of the FSIA. As Judge Mahoney specifically stated: "This is not a ruling, of course, that anything NNPC did amounted to an explicit waiver pursuant to Section 1610(d)(1)." (A-11) Nevertheless, contrary to the FSIA's requirement that the foreign state must explicitly waive its immunity from prejudgment attachment in order to lose it, the Second Circuit upheld the district court order.

The effect of the Second Circuit's decision is to allow—for the first time—prejudgment attachment of a foreign state's assets without the explicit waiver required by Congress in § 1610(d)(1) of the FSIA. Thus, contrary to the express terms of the FSIA, the Second Circuit allowed prejudgment attachment through an unprecedented judge-made procedural rule that:

> a district court may require a foreign state to invoke Section 1609 in its initial response to the opposing party's requests for an order of attachment, and the court may reject as untimely any later assertion of Section 1609's prohibitions. (A-8)

By allowing the district court to restrain a foreign state's assets prior to judgment, the Second Circuit's decision

defeats Congress' intention to eliminate the offensive and drastic provisional remedy of prejudgment attachment except in the narrow category of cases where the foreign state has expressly consented. The Second Circuit has impermissibly added a new category of cases in which foreign state assets may be restrained before judgment—those cases in which the foreign state does not assert the immunity at the first procedural juncture.

However, court-imposed procedural rules must be "consistent with Acts of Congress" and cannot supplant a substantive right conferred upon foreign states by Congress in the FSIA. 28 U.S.C. § 2071 (West Supp. 1991); *Carter v. Clark,* 616 F.2d 228, 230 (5th Cir. 1980); *Rodgers v. United States Steel Corp.,* 508 F.2d 152, 163 (3d Cir.), *cert. denied,* 423 U.S. 832 (1975). Thus, neither the local court rule relied upon by the district court in refusing to consider NNPC's immunity claim, nor the Second Circuit's "initial response" rule which rejects NNPC's assertion of immunity as untimely, may override the FSIA's specific statutory grant of immunity from prejudgment attachment in the absence of an explicit waiver by the foreign state.

B. The Second Circuit's Decision Ignores This Court's Teachings on the FSIA

This Court has never addressed the issue of foreign state immunity from prejudgment attachment under the FSIA, 28 U.S.C. § 1609, 1610(d). However, this Court has extensively analyzed the important foreign policy interests embodied in the FSIA, and the strict deference owed to its provisions. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

In *Verlinden*, this Court discussed at length the history leading up to passage of the FSIA, and the objectives which Congress attempted to accomplish—namely, "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assur[e] litigants that

. . . decisions are made on purely legal grounds and under procedures that insure due process." 461 U.S. at 488. As this Court pointed out, in order to accomplish these policies Congress enacted "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.*

Amerada Hess again recognized "Congress' intention to enact a comprehensive statutory scheme" in which the FSIA exclusively would prescribe the powers of United States courts over foreign states. 488 U.S. at 435 n.3. This Court emphatically held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country" and rejected the plaintiff's contention that adherence to certain international agreements provided an independent basis for jurisdiction or somehow constituted an "implicit" waiver of jurisdictional immunity under the FSIA. *Id.* at 443.

The Second Circuit's decision in this case disregards the teachings of this Court on the exclusivity of the rules and standards prescribed by Congress in the FSIA for cases involving foreign state defendants. Under the Second Circuit's decision, it no longer matters whether the foreign state has explicitly waived its immunity from prejudgment attachment; all that does matter is whether the foreign state asserts that immunity in what the district court deems to be a timely fashion. Thus, whereas Congress provided in the FSIA that immunity from prejudgment attachment must be affirmatively and unambiguously waived by the foreign state in order to be lost, now—at least in the Second Circuit—mere silence or inadvertence will cause the loss of this immunity. In effect, the Second Circuit ruled that notwithstanding the language of the FSIA, no waiver of any kind is necessary for a foreign state to lose its immunity from prejudgment attachment.

Thus, in one stroke, characterized as a "procedural" rule, the Second Circuit has swept away the FSIA's immunity provision and reinstated the availability of prejudgment attachment which Congress so carefully and specifically eliminated. This procedural rule, which is unique to the Second Circuit, also destroys the uniformity of rules and procedures pertaining to foreign state defendants which Congress sought to ensure by enacting the comprehensive statutory scheme contained in the FSIA. Now, foreign state defendants face a serious disadvantage in the Second Circuit: if, by some chance, they fail to assert § 1609 and 1610 at the first opportunity—whatever that may be[4]—they will lose their immunity.

C. The Second Circuit's Decision Creates A Conflict with the Fifth Circuit

The Second Circuit's decision is the first and only instance in which a court has deviated from the FSIA's "explicit waiver" requirement in § 1610(d). The FSIA's prejudgment attachment immunity provision has been considered by the Fifth Circuit, which has recognized that a court is not empowered to order prejudgment attachment of a foreign state's assets unless the foreign state has unequivocally evidenced its express consent to such attachment. *Atwood Turnkey Drilling v. Petroleo Brasileiro,* 875 F.2d at 1176-77.

In *Atwood*, the Fifth Circuit considered whether a district court's injunction requiring the defendant Petroleo Brasileiro, the national oil company of Brazil, to extend or reinstate a letter of credit in favor of the plaintiff was prohibited by the FSIA's prejudgment attachment immunity provision. The plaintiff argued that Petroleo had waived its immunity in the letter of credit, which provided:

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4 The Second Circuit failed to explain what it meant by the "initial response to the opposing party's requests for an order of attachment." Thus the decision below not only creates a new rule applicable only in the Second Circuit, it has raised considerable confusion for foreign states as to when their immunity must be asserted.

> The Borrower . . . expressly and irrevocably waives any such right of immunity (including any immunity *from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise)* . . . (emphasis supplied)

Atwood, 875 F.2d at 1177. Based upon this clear and unequivocal language which *specifically waived immunity from prejudgment attachment*, the Fifth Circuit found that the district court's attachment order was permissible under the FSIA. *Id.*

Atwood provides a prime example of what may constitute an "explicit waiver" of prejudgment attachment immunity under the FSIA. The FSIA requires that this standard be satisfied before a district court is permitted to order prejudgment attachment of a foreign state's assets. While no other court has addressed this issue, a number of district courts have considered § 1609 and 1610(d) and have undertaken the same strict analysis of the explicit waiver requirement. *See e.g., Security Pacific Nat'l Bank v. Government and State of Iran*, 513 F. Supp. 864, 879-80 (C.D. Cal. 1981); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 392-93 (D.N.J. 1979), *aff'd on other grounds*, 699 F.2d 657 (3d Cir. 1983).

Prior to this decision, even the Second Circuit rigidly enforced the "explicit waiver" requirement of § 1610, holding that:

> [A] waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that term: the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country. We do not take lightly the congressional demand for explicitness.

S & S Machinery v. Masinexportimport, 706 F.2d at 416.

No court has ever held, as the Second Circuit did in this case, that immunity from prejudgment attachment may be

lost through operation of a procedural timeliness rule. The Second Circuit's approach in this case is fundamentally at odds with the Fifth Circuit's analysis as well as its own prior decisions and that of the district courts in California and New Jersey. Because of the confusion this decision will create—for instance, in trapping unwary foreign state defendants into unwittingly losing their immunity by not raising it in their "initial response" to a request for security—as well as the disparity between the Second Circuit's approach and the standard applied by the Fifth Circuit, this Court should grant certiorari.

II. Appellate Jurisdiction Under *Cohen*

NNPC based its appeal of the district court's order requiring it to post prejudgment security in part on the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541. Under *Cohen*, an interlocutory order is immediately appealable if the order (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.

The majority opinion held that the order in this case was not immediately appealable under the *Cohen* doctrine, because that doctrine generally applies to orders *denying* a request for security, not to orders *requiring* security, as in this case. The Second Circuit's sole reason for the distinction is that orders granting security "generally cause no irreparable loss" because the "security will be repaid with interest if they prevail." (A-5)

This Court has never addressed the question whether a district court order which denies a claim to immunity from prejudgment attachment under § 1610(d) of the FSIA is immediately appealable under the collateral order doctrine. However, this Court has sanctioned immediate appellate review where a district court has denied claims of other types of immunities. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30

(1985) (qualified immunity from suit of United States Attorney General); *Nixon v. Fitzgerald,* 457 U.S. 731, 742-43 (1982) (absolute immunity of President of United States from suit for civil damages); *Helstoski v. Meanor,* 442 U.S. 500, 505-08 (1979) (U.S. Congressman's immunity under Speech and Debate clause); *Abney v. United States,* 431 U.S. 651, 656-61 (1977) (immunity under double jeopardy clause).

Following this Court's decisions, several circuit courts have held that the denial of a foreign state's claim to jurisdictional immunity under the FSIA is immediately appealable. *Stena Rederi AB v. Comision de Contratos del Comite,* 923 F.2d 380, 385-86 (5th Cir. 1991); *Foremost-McKesson v. Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C. Cir. 1990); *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic,* 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied,* 493 U.S. 937 (1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445, 450-51 (6th Cir. 1988); *Compania Mexicana de Aviacion, S.A. v. United States District Court,* 859 F.2d 1354, 1358 (9th Cir. 1988).

These cases all recognize that a party will be denied any effective appellate review of a judicial order denying an assertion of immunity from judicial process if that review has to await termination of the process from which the party claims immunity. Although in this case NNPC claims immunity from prejudgment restraint of funds as opposed to immunity from suit, as in the cases heretofore decided, there is no conceptual distinction. As Judge Mahoney stated in disagreeing with the majority on this issue: "Providing security in the amount of $10,255,728.80 may be a lesser burden [than a trial] but it is surely not *de minimus.*" (A-10)

The effect of the Second Circuit's decision is to deny every foreign state any appellate review when a district court orders prejudgment attachment in violation of the FSIA. Ironically, the Second Circuit would allow immediate appellate review for the plaintiff whose request for attachment of foreign state assets was denied, favoring those whom the FSIA intended to

restrict while eroding the protection Congress intended foreign states to enjoy.

The Second Circuit's rejection of the collateral order doctrine with respect to foreign state immunity from prejudgment attachment conflicts with this Court's rulings in *Mitchell, Nixon, Helstoski and Abney,* as well as the decisions of the Fifth, Sixth, Seventh, Ninth, and District of Columbia Circuits cited above. Accordingly, this Court should grant certiorari to resolve the conflict and dispel the confusion concerning the appealability of district court denials of immunity claims.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Dated: New York, New York
March 9, 1992

Respectfully submitted,

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Opinion of the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1924—August Term, 1990

(Argued: July 23, 1991 Decided: Oct. 30, 1991)

Docket No. 91-7445

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Petitioner-Appellee,

—v.—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent-Appellant.

B e f o r e:

WINTER, ALTIMARI and MAHONEY,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (John F. Keenan, *Judge*), denying a motion for reconsideration of an order requiring Nigerian National Petroleum Corporation to post security of $10,255,728.80 pending the outcome of related litigation in Nigeria. We dismiss the appeal for lack of jurisdiction. Treating the appeal as a petition for a writ of mandamus, we deny the petition.

Judge Mahoney concurs in a separate opinion.

GERALD A. NOVACK, New York, New York (Carol D. Quackenbos, Beverly L. Brown (Student Clerk), Lord Day & Lord, Barrett Smith, Melvin J. Tublin, Michael O. Hardison, Poles, Tublin, Patestides & Stratakis, New York, New York, of counsel), *for Petitioner-Appellee.*

JOSEPH D. PIZZURRO, New York, New York (Miriam K. Harwood, Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel), *for Respondent-Appellant.*

WINTER, *Circuit Judge*:

This appeal involves an arbitration proceeding in Nigeria between Nigerian National Petroleum Corporation ("NNPC") and Caribbean Trading and Fidelity Corporation ("CTFC"). CTFC won an arbitration award in that proceeding and then brought a petition in the Southern District of New York for confirmation and enforcement of the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("Convention"). *See* 9 U.S.C.A. § 201 (West Supp. 1991). NNPC moved to dismiss this petition. Judge Keenan stayed the action pending completion of related Nigerian proceedings and ordered NNPC to post security pursuant to Article VI of the Convention. NNPC moved for reconsideration, arguing for the first time that the portion of the order requiring it to post security violated the Foreign Sovereign Immunities Act ("FSIA"). Judge Keenan denied this motion on the ground that new matters may not be raised in motions for reconsideration under the Southern District's Civil Rule 3(j). NNPC appealed. We dismiss the appeal for lack of jurisdiction. Treating the appeal as a petition for a writ of mandamus, we deny the petition.

BACKGROUND

NNPC is a statutory corporation owned by the government of Nigeria and is a "foreign state" for purposes of the FSIA. 28 U.S.C. § 1603(a) (1988). CTFC is an Anguillan, British West Indies, corporation. In April 1985, NNPC entered into a contract for the sale of Nigerian crude oil. Although CTFC's status as a party to the contract remains in dispute, CTFC did sign the contract. Disputes involving the contract arose, and, as the contract required, the parties went to arbitration in Nigeria. On March 28, 1990, the arbitrators awarded CTFC $10,255,728.80 in damages and 4,110,000 barrels of oil.

CTFC then petitioned for confirmation of the arbitration award in the Southern District of New York, pursuant to Articles I and III of the Convention, to which the state of Nigeria is a party. On June 25, 1990, NNPC petitioned the High Court of Lagos State in Lagos, Nigeria, to set aside the arbitration award. NNPC also moved in the Southern District to dismiss CTFC's petition for confirmation of the arbitration award. NNPC argued that the district court lacked subject-matter and personal jurisdiction over NNPC under the FSIA. 28 U.S.C. §§ 1330, 1604 (1988). Additionally, NNPC contended that even if the district court had jurisdiction, it should not recognize the award under Articles IV and V of the Convention. Finally, NNPC argued that, its other contentions failing, the district court should stay the action during the pendency of the Nigerian proceedings, pursuant to Article VI of the Convention. CTFC in turn requested an order requiring NNPC to post security should a stay issue.

In his written opinion, Judge Keenan expressed doubt about the existence of subject-matter and personal jurisdiction under the FSIA, 28 U.S.C. §§ 1330, 1604, 1605, but declined to resolve those issues. Instead, he stayed the proceeding pending a determination by the High Court of Lagos of the validity of the arbitration award and ordered NNPC to post security of $10,255,728.80. The order requiring the posting of security was based on Article VI of the Convention, which provides:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

9 U.S.C.A. § 201 (West Supp. 1991). NNPC then moved for reconsideration, arguing for the first time that the order requiring the posting of security was barred by Section 1609 of the FSIA. Section 1609 states that "the property . . . of a foreign state shall be immune from attachment[,] arrest and execution" except where, as provided by Section 1610(d), explicitly waived or necessary to satisfy a judgment. NNPC analogizes the order to post security to a prejudgment attachment and contends that Section 1609 immunizes it from such an order. Judge Keenan denied this motion, holding that under Local Rule 3(j), NNPC's invocation of Section 1609 was untimely because it could not be raised for the first time in a motion for reconsideration. It is from this order that NNPC now appeals.

DISCUSSION

A. *Jurisdiction Under the Collateral Order Doctrine*

Orders denying or requiring security are obviously interlocutory, and questions regarding their appealability turn on the applicability of the so-called collateral order doctrine established in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Supreme Court permitted an appeal from a refusal by a district court to order the posting of security by a plaintiff in a derivative action. *Cohen* held appealable "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration

be deferred until the whole case is adjudicated." *Id.* at 546. A subsequent gloss upon *Cohen* has specified three conditions for appealability under the collateral order doctrine. The order must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citations omitted).

As *Cohen* held, orders denying security fall within the collateral order exception and are appealable. This appealability stems from the fact that the denial of security is, absent a change of conditions, conclusive with regard to that issue of security, is separable from the merits of the underlying action, is of great importance because funds may not be available at a later date to satisfy a judgment, and, if erroneous, cannot be redressed on appeal at the conclusion of the action. In contrast, orders requiring the posting of security are analogous to orders denying motions to vacate attachments, which are not appealable. *See Drys Shipping Corp. v. Freights, Sub-Freights, Charter Hire*, 558 F.2d 1050, 1051 (2d Cir. 1977). We therefore believe that orders requiring security are also not appealable. *See Seguros Banvenez S.A. v. S/S Oliver Drescher,* 715 F.2d 54, 57 (2d Cir. 1983) (Mansfield, J., concurring) (appeal from "the district court's non-final security order . . . does not fit within the *Cohen* exception"). The distinction between orders denying security and those granting it lies in the original *Cohen* formulation that the issue must be "too important to be denied review." 337 U.S. at 546. Orders granting security generally cause no irreparable loss in that parties posting security will be repaid with interest if they prevail.

NNPC argues, however, that Judge Keenan's order requiring security violates the FSIA, which establishes for foreign states an "immun[ity]" from prejudgment attachment. Citing a number of cases holding appealable denials of claims of immunity under the FSIA, NNPC argues that the order in question is immediately appealable. *See, e.g., Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385-

86 (5th Cir. 1991); *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346-47 (7th Cir. 1987). However, these cases deal exclusively with claims of immunity from suit based on Section 1604 of the FSIA, and not claims of immunity from prejudgment attachment based on Section 1609 of the FSIA. The decisions cited can be analogized to cases involving such claims as "a double-jeopardy defense . . . a public official's qualified immunity from suit, and . . . a witness's absolute immunity," *Segni*, 816 F.2d at 345, the denial of which are immediately appealable on the ground that the protections are designed to guarantee not only an acquittal but also freedom from trial. Thus, like a double jeopardy claim, a foreign state's claim of immunity from suit under Section 1604 is a claim of immunity from pretrial and trial proceedings as well as a claim to a favorable outcome. *See id.* at 847 ("A foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity."); *see also Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("A major characteristic of the denial or granting of a claim appealable under *Cohen* . . . is that 'unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all.' ") (citation omitted).

Assuming that an order requiring the posting of security is an "attachment" of a foreign state's property within the meaning of the FSIA—a matter about which doubt exists, *see Sperry Int'l Trade, Inc. v. Government of Israel*, 689 F.2d 301, 305 n.7 (2d Cir. 1982); *Willamette Transport, Inc. v. CIA. Anonima Venezolana de Navegacion*, 491 F. Supp. 442, 443-44 (E.D. La. 1980)—such an order is not analogous to either a sovereign immunity claim or an immunity claim under Section 1604. In those cases, costly proceedings would follow an erroneous denial of the claim unless the order were appealable. In such a case, the litigant, be it domestic sovereign or foreign state, would ultimately prevail but only after bearing the cost of a trial. This ultimate success would not

redress the erroneous denial of an immunity from the trial itself.

In the case of an order requiring security, an erroneous grant of such an order will not subject a foreign state to a proceeding that could be avoided by a successful appeal. The immunity conferred by Section 1609 relates solely to the merits of the order requiring security. However, as noted, the merits of an order granting security may not be appealed under the collateral order doctrine. We perceive no reason to distinguish for purposes of appellate review between an order granting security that is erroneous on the merits and an identical order that is issued in the face of a statute such as the FSIA stating that a party is "immune" from such an order. The cases denying jurisdiction over orders granting security are thus applicable, and we therefore dismiss the appeal.

B. *Mandamus*

We have often deemed it appropriate to treat an appeal dismissed for lack of jurisdiction as a petition for a writ of mandamus. *See Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987). In view of NNPC's claim that Judge Keenan disregarded a plain statutory directive—a matter that might well be redressable through a mandamus proceeding—we believe that to be the appropriate course in the instant matter. The familiar principles governing petitions for a writ of mandamus need be only briefly repeated. Mandamus may not be used to address error, but is available to redress usurpations of power or clear abuses of discretion. *Id.*

Mandamus is not warranted in the present case. The issue before us concerns Judge Keenan's refusal to vacate the order requiring NNPC to post security on the ground that NNPC raised the effect of Section 1609 only in its motion for reconsideration. After NNPC first requested a stay in the proceedings under Article VI of the Convention, CTFC responded by arguing that, if the district court should decide to stay the proceedings, then it should require NNPC to post security as Article VI also provides. The only matter argued concerning

security involved not the legality of such an order but the amount to be posted. NNPC thus never mentioned the immunity now claimed under Section 1609.

In its memorandum in support of a motion for reconsideration, NNPC argued for the first time that Judge Keenan's order requiring security was an attachment under Section 1609. The district court did not reach the merits of the issue but rather rejected the claim as untimely under Civil Rule 3(j) of the Southern District of New York. That Rule provides that, with regard to motions for reconsideration, "[t]here shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." This rule has been interpreted as precluding arguments raised for the first time on a motion for reconsideration. *See Schonberger v. Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) ("a party making a motion for reargument may not, under Civil Rule 3(j), advance new facts, issues or arguments not previously presented to the Court"); *Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, Inc.*, 624 F. Supp. 856, 857 (S.D.N.Y. 1985).

We believe that the applicability and effect of Section 1609 are not matters, like subject-matter jurisdiction, that may be raised at any time by a foreign state. We therefore believe that a district court may require a foreign state to invoke Section 1609 in its initial response to the opposing party's requests for an order of attachment, and the court may reject as untimely any later assertion of Section 1609's prohibitions. This wholly procedural rule does not infringe on the prerogatives of a foreign state under the FSIA. It merely imposes orderly procedures upon the assertion of those prerogatives. Judge Keenan's refusal to address the merits of NNPC's belated invocation of Section 1609 was thus neither a usurpation of power nor a clear abuse of discretion. Treating the appeal as a petition for a writ of mandamus, we deny the petition.

CONCLUSION

We dismiss the appeal for lack of jurisdiction. Treating the appeal as a petition for writ of mandamus, we deny the petition.

MAHONEY, *Circuit Judge*, concurring in the judgment.

I concur in the judgment of affirmance, but write separately because of my disagreement with the majority's ruling as to appealability.

I note at the outset the majority's observation that *Sperry Int'l Trade, Inc. v. Government of Israel*, 689 F.2d 301, 305 n.7 (2d Cir. 1982), and *Williamette Transport, Inc. v. CIA. Anonima Venezolana de Navegacion*, 491 F. Supp. 442, 443-44 (E.D.La. 1980), cast doubt upon the proposition "that an order requiring the posting of security is an 'attachment' of a foreign state's property within the meaning of the FSIA." *Williamette* involved a special situation of "equality of security" between an admiralty claimant and counterclaimant, and in any event is not binding authority here. *Sperry* ruled that an interim arbitral award directing that the proceeds of a letter of credit be held jointly in escrow by the parties to the arbitration was "an *in personam* order, not an attachment order of the sort forbidden by § 1609." 689 F.2d at 305 n.7.

Somewhat more recently, however, we held in *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir.), *cert. denied*, 464 U.S. 850 (1983), that an injunction prohibiting negotiation of letters of credit was an FSIA "attachment," stating: "The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property." 706 F.2d at 418; *see also Raji v. Bank Sepah-Iran*, 131 Misc.2d 158, 162, 495 N.Y.S.2d 576, 581 (Sup. Ct. 1985) ("The congressional intent was to encompass all encumbrances and restraints imposed to prevent the dissipation of assets before judgment."). The restraint involved here in compelling a

bond in excess of ten million dollars is at least as severe an imposition upon property interests as the injunction which *S & S Machinery* held to be an FSIA "attachment."

In any event, the majority opinion is premised upon the assumption (which I consider a correct view of the law) that the district court's order requiring the posting of security was an "attachment" of a foreign state's property within the meaning of 28 U.S.C. §§ 1609 and 1610 (1988). Section 1609 provides that "the property in the United States of a foreign state shall be *immune* from attachment" (emphasis added). The majority concludes, however, that there is "no reason to distinguish for purposes of appellate review between an order granting security that is erroneous on the merits and an identical order that is issued in the face of a statute such as the FSIA stating that a party is 'immune' from such an order."

I disagree. The majority regards as distinguishable a line of cases allowing immediate appeal from denials of claims of immunity under the FSIA. *See Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385-86 (5th Cir. 1991); *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346-47 (7th Cir. 1987)). Admittedly, the immunity denied in these cases was immunity from subject matter jurisdiction pursuant to 28 U.S.C. § 1604 (1988), which affords protection from the "expense of defending what may be a protracted lawsuit." *Compania Mexicana*, 859 F.2d at 1358 (citing *Segni*, 816 F.2d at 345). Providing security in the amount of $10,255,728.80 may be a lesser burden, but it is surely not *de minimis*.

Congress valued the protection against prejudgment attachment so highly, furthermore, that it specified that such immunity may only be "explicitly" waived. *See* 28 U.S.C. § 1610(d)(1) (1988). On the other hand, section 1604 immunity from subject matter jurisdiction, as well as immunity from execution of judgment and attachment in aid of execution, may be waived "either explicitly or by implication." *See id.* §§ 1605(a)(1), 1610(a)(1). It is accordingly my view that the majority's ruling on appealability gives short shrift to the

congressional policy underlying FSIA immunity from pretrial attachment, and that appeals invoking that immunity properly come within the "collateral order" rule of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), as amplified in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

I nonetheless concur in the judgment of the majority. Whether this appeal is regarded as before us pursuant to the collateral order exception to 28 U.S.C. § 1291 (1988), as I would rule, or is examined by the more stringent standards of mandamus, I agree with the majority's conclusion that the district court did not abuse its discretion in ruling, pursuant to Civil Rule 3(j) of the Southern District of New York, that NNPC's invocation of the FSIA was untimely. *See* Fed. R. Civ. P. 83 (district courts may adopt rules not inconsistent with Federal Rules of Civil Procedure) and 12(g) (as a general rule, defense not asserted in initial motion presenting other defenses may not be asserted by subsequent motion). This is not a ruling, of course, that anything NNPC did amounted to an explicit waiver pursuant to section 1610(d)(1). Rather, it is a ruling that the section 1610(d)(1) defense was not timely asserted.

Opinion of the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4169 (JFK)

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Petitioner,

—against—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent.

OPINION AND ORDER

APPEARANCES: For the Petitioner:
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JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Before the Court is a petition to confirm an arbitration award in favor of Caribbean Trading & Fidelity Corp. (the

"Petitioner") and against Nigerian National Petroleum Corp. ("NNPC"). NNPC opposes the petition and seeks to dismiss the petition based on lack of subject matter and personal jurisdiction as well as insufficiency of process. Fed. R. Civ. P. 12(b)(1), (2) and (5). In the alternative, NNPC asks that these proceedings be stayed pending the outcome of proceedings before the High Court in Lagos, Nigeria, instituted by NNPC, seeking to set aside the arbitration award. Oral argument was heard by the Court on November 26, 1990, and decision was reserved.

Background

Petitioner is an Anguillan, British West Indies corporation with an office and place of business in New York City. NNPC is a Nigerian corporation and a governmental entity with an office and place of business in Lagos, Nigeria.

On April 17, 1985, NNPC entered into a contract for the sale and purchase of Nigerian crude oil. The party with whom NNPC contracted is one of the disputed issues. NNPC claims that it contracted with the Government of St. Christopher and Nevis ("St. Kitts"), through Petitioner as an agent for St. Kitts. According to Respondent, then, the parties entered into a government-to-government contract. Petitioner claims, however, that the contract does not refer to St. Kitts, but only to it and that there is no question that NNPC contracted with Petitioner, a private entity.

The contract provides for arbitration of disputes pursuant to the Nigerian Arbitration Act, Cap. 13 of the 1958 Revised Edition of the Laws of the Federation of Nigeria. In addition, the contract provides that arbitration is to be binding on the parties. *See* Contract at ¶ 23.1. A dispute arose between the parties, and Petitioner instituted an action against NNPC in Lagos, Nigeria. NNPC filed a motion for summary judgment, asserting as a defense the argument that Petitioner was not a party to the contract. The motion was never decided, and arbitration was mutually agreed upon on January 9, 1990. NNPC appointed Major-General I.B.M.

Haruna (Rtd) OFR as its arbitrator, and Petitioner appointed Mr. Adegboyega Ogunsanya as its arbitrator.

The parties briefed their arguments, and oral arguments were heard at hearings held in Lagos, Nigeria, on March 19 and 20, 1990. The arbitrators rendered a written award dated March 28, 1990, in favor of Petitioner. The award provides that NNPC is to provide Petitioner with a total of 4,110,000 barrels of oil, and $10,255,728.80 at 20% interest. In addition, the award states that NNPC's notice of termination of contract dated July 29, 1988, is to be declared null and void and to no effect. Finally, the arbitrators awarded themselves fees in the amount of $596,879.00.

NNPC Facts

NNPC presents the following facts in opposition to the petition. NNPC is a statutory corporation owned entirely by the Government of Nigeria, and therefore is "an agency or instrumentality of a foreign state," and is a "foreign state," for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a)(b) ("FSIA"). NNPC is alleged to have its sole presence in Lagos, Nigeria and no office in the United States.

Petitioner is alleged to have minimum capitalization and little or no assets. This allegation is set forth based upon an opinion written by Judge Conner in *Maritime Ventures Int'l Inc. v. Caribbean Trading & Fidelity Ltd.*, 689 F. Supp. 1340, 1349, 1352 (S.D.N.Y. 1988). In that case, an officer of the corporation submitted an affidavit which showed that Petitioner has a share capital of $1,000.00, divided into 1000 shares of $1.00 each. It has two registered shareholders, each of whom holds one share only. In the action before Judge Conner, Caribbean Trading was acting through a mandate of the Government of St. Kitts to act on behalf of the Government for the purpose of handling crude oil and the party with whom it was to contract was NNPC.

NNPC states that it has only two types of contracts: one with private parties and one with governments. When con-

tracting with private parties, NNPC has rigid requirements—it deals only with international petroleum companies having experience and financial resources to ensure implementation and performance of the contract. Private parties also are required to own or to have access to refining facilities and to have substantial capitalization and assets. Accordingly, NNPC submits that it never would have contracted with Petitioner as a private party due to its lacking qualifications, and NNPC only contracted with Petitioner as an agent for the Government of St. Kitts. The contract therefore is, NNPC contends, a government-to-government contract.

On April 8, 1985, St. Kitts executed a mandate authorizing Caribbean Trading and Fidelity Ltd. ("CTF Ltd.") to act on its behalf in handling crude oil transactions, because St. Kitts does not have a national oil corporation of its own. The mandate referred to a power of attorney, dated April 1, 1985, issued by CTF Ltd. to Michael Z. Matthew, and specifically referred to a crude oil sales contract between CTF Ltd., acting on behalf of the Government of St. Kitts-Nevis, and NNPC. *See* Egwuenu Aff. Exh. C. On April 17, 1985, NNPC, in reliance on the mandate, entered into the underlying contract at issue in this case.

In a letter from Mr. Matthew to NNPC, Mr. Matthew requests that St. Kitts be accorded more favorable credit terms than those contained in the contract. The request was based on the fact that NNPC provided certain favorable credit terms to Economic Community of West African States ("ECOWAS") countries. *See* Egwuenu Aff. Exh. 0. This request by Mr. Matthew, NNPC contends, would have been senseless had he not been acting as an agent for St. Kitts.

Problems arose between NNPC and CTF Ltd. In September 1986, NNPC learned that the power of attorney CTF Ltd. had issued to Mr. Matthew had been cancelled ten months earlier in November 1985, but NNPC had had no knowledge of that termination. Matthew, however, had continued during that time to conduct activities under the contract. NNPC then sent notice that it was suspending the contract until another acceptable power of attorney was delivered to it. Matthew then approached the government of

St. Kitts and persuaded it to revoke the prior mandate issued to CTF Ltd. and issue a new mandate to Petitioner, which at the time was a new company in formation. The Prime Minister of St. Kitts accepted that proposal in writing. *See* Egwuenu Aff. ¶ 10, Exh.E.

On October 22, 1986, NNPC was presented with a new mandate from St. Kitts, superseding the original mandate, and substituting Petitioner as St. Kitts' agent under the contract. *See* Egwuenu Aff. ¶ 10, Exh. F. The new mandate was sent by Petitioner's Nigerian attorneys, who confirmed in a cover letter to NNPC that the contract was a government-to-government contract, and that Petitioner was acting solely as an agent for St. Kitts. *See* Egwuenu Aff. Exh. G. A letter also was received by NNPC from the Prime Minister of St. Kitts, Kennedy A. Simmonds, dated November 12, 1986, confirming the revocation of the mandate to CTF Ltd. and confirming the parties' intent that St. Kitts be NNPC's contracting party. *See* Egwuenu Aff. Exh. H.

Based on these confirmations, NNPC recommenced delivering crude oil under the contract. However, on November 27, 1986, NNPC received a letter from the Attorney General of St. Kitts, S.W. Tapley, in which it was requested that NNPC not permit any further lifting of crude oil under the contract until further advised by the Government of St. Kitts. *See* Egwuenu Aff. ¶ 11, Exh. I. NNPC complied and suspended deliveries.

A third suspension occurred in May 1987. NNPC received a letter from the Prime Minister of St. Kitts in March of 1987, informing NNPC that the prior mandate of October 22, 1986 to Petitioner had been revoked. A new mandate had been issued to a company called Gulf International Holdings, S.A. *See* Egwuenu Aff. ¶ 12, Exhs. K & L. On May 22, 1987, NNPC's Managing Director sent a letter to the Prime Minister of St. Kitts, stating that NNPC was suspending liftings under the contract until it received a jointly signed document by the Government of St. Kitts and Mr. Matthew indicating which entity had the mandate to operate the contract. *See* Egwuenu Aff. ¶ 12, Exh. M. NNPC eventually received authorization from officials of the Government of

St. Kitts attesting to the authority of Mr. Matthew and Petitioner under the October 22, 1986 mandate.

On July 29, 1988, NNPC sent to Petitioner a notice of termination pursuant to Article 2 of the contract, effecting a termination of the contract as of October 27, 1988. Article 2 of the contract provides that "the contract shall continue until terminated by either party by giving at least 90 days notice in writing." Notice of Petition, "Contract."

Nigerian Proceedings

On June 25, 1990, NNPC obtained the issuance of an originating summons from the High Court of Lagos State in Lagos, Nigeria. NNPC has attacked the award on the following grounds: the proceedings were conducted with undue haste and NNPC was prevented from presenting all of its evidence, thus denying NNPC due process; the arbitral tribunal was not constituted in accordance with the agreements of the parties or Nigerian law; the arbitrators refused to recognize the undisputed fact that the contract was one between two governments; and the fees awarded by the arbitrators to themselves were unconscionably excessive.

Hearings originally were scheduled for July 16, 1990, and the date was adjourned several times due to Petitioner's objections to service of process. The High Court has denied the motion of Petitioner to set aside the originating summons of NNPC, and a hearing to consider the application to set aside the arbitration award is to be held before the end of 1990. Petitioner has indicated, however, that it is appealing the denial of its motion to set aside the originating summons, and that until that appeal is resolved no further hearings will occur in the High Court.

Discussion

Petitioner seeks the following relief: confirmation of the award under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., the award of attorneys' fees for failure of NNPC to pay

without justification the amount owed, and the issuance of writs of execution upon NNPC's assets in the United States, once a reasonable period of time has elapsed.

I. *Jurisdictional Immunity*

NNPC first argues that the Court lacks jurisdiction over it. NNPC is a "foreign state" under the FSIA, which provides the exclusive basis for asserting jurisdiction over a foreign state in a United States court. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 688 (1989). Under 28 U.S.C. § 1330(a), federal district courts have original subject matter jurisdiction over an action against a foreign state only when the foreign state is not entitled to jurisdictional immunity under 28 U.S.C. §§ 1604-07. In addition, personal jurisdiction can exist only if subject matter jurisdiction exists under § 1330(a) and process is served in accordance with the exclusive service provisions of 28 U.S.C. § 1608.

The parties agree that the particular section of 28 U.S.C. which provides the applicable exceptions to jurisdictional immunity is § 1605(a)(6), which provides an exception to immunity in a case:

> in which the action is brought, either to enforce an agreement made between the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section

> or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

NNPC maintains that, because the contract at issue is not an "agreement made between the foreign state with or for the benefit of a private party," this contract is excluded because it is a government-to-government contract.

NNPC points to the rules of agency and contract to determine the parties to an arbitration agreement, and states that it is a "fundamental principle of agency and contract law that a person making or purporting to make a contract as agent for a disclosed principal does not become a party to the contract." Restatement (Second) of Agency § 320 (1958). A principal is disclosed if, at the time of making the contract, the other party to the contract has notice that the agent is acting for the principal and knowledge of the principal's identity. Judge Conner found in the earlier case in this Court concerning the same entities that "[a] written power of attorney is a formal contract of agency and creates a principal-agent relationship . . . [and] the mandate constitutes significant evidence of an agency relationship . . . ." *Maritime Ventures Int'l*, 689 F. Supp. at 1353-54. Therefore, NNPC argues that it is immune from jurisdiction in this Court because it dealt knowingly with another foreign government and never agreed to have the arbitration heard in the United States.

The Court is troubled by the arbitrators' decision on this issue. The correspondence attached to the Egwuenu Affidavit strongly suggests that NNPC understood its multi-million dollar contract to be with St. Kitts. In addition, the Court rejects Petitioner's continued suggestion that NNPC's participation in the arbitration constitutes a waiver of any objection to the finding of the arbitrators that Petitioner was the true party to the contract. As pointed out during oral argument by counsel for NNPC, NNPC made its objection to Petitioner acting as the contracting party during the proceedings in Nigeria and before this Court. The issue was never resolved by the High Court in Lagos, and the arbitrators found against NNPC, which finding NNPC seeks to have

reviewed. NNPC's counsel correctly notes that had NNPC refused to submit the dispute to arbitration in Nigeria, Petitioner simply would have obtained a default judgment against NNPC. NNPC then would be in the position of having to defend before this Court its non-participation in the arbitration as well as having to argue the non-enforceability of the arbitration award. NNPC thus finds itself between the proverbial rock and a hard place.

Petitioner contends, however, that NNPC indeed has waived its sovereign immunity pursuant to the terms of the arbitration agreement:

> Should any dispute arise in connection with the terms of the Contract or from the performance thereof such dispute shall be settled by arbitration and the Nigerian Arbitration Act. Cap. 13 of the 1958 Revised Edition of the Laws of the Federation of Nigeria, shall govern the arbitration. Either party may serve on the other a written demand for arbitration. Within forty-five days of such a demand being served each party will appoint an arbitrator and if the two arbitrators so appointed fail to reach an agreement within thirty days the said arbitrators are to appoint a third arbitrator. If the arbitrators appointed by the parties do not agree to the appointment of such a third arbitrator or if any party fails to appoint the arbitrator to be appointed by it such an arbitrator or third arbitrator is to be appointed by the International Chamber of Commerce in Paris on the application of either party to the dispute (notice of intention to apply having been duly given in writing by the applicant to the other party to the dispute). In the event of the third arbitrator being appointed by the International Chamber of Commerce, the arbitration proceedings shall take place in Paris, convened and presided over by the third arbitrator.

Arbitration Award Exh. 1, ¶ 23.1 (emphasis supplied). Accordingly, Petitioner contends that under § 1605(a)(1), NNPC has implicitly waived sovereign immunity, because this is a case in which "a foreign state has agreed to arbitration

in another country or where a foreign state has agreed that the law of a particular country should govern a contract." H.R. Rep. No. 1487, 94th Cong., 2nd Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6604, 6617.

This same argument was considered by the court in *Maritime Ventures Int'l Inc.*, in which Judge Conner stated as follows:

> A literal interpretation of the House Report would subject a foreign government to jurisdiction in the United States whenever it agreed to be governed by the laws or to arbitrate in the forum of any country other than its own, even when the contract makes no mention of the United States. This would result in a vast increase in the jurisdiction of the federal courts over matters involving sensitive foreign relations. . . . When the contract names the United States, however, it is both reasonable and consistent with the legislative history to find an implicit waiver.

689 F. Supp. at 1351 (citations omitted). *Accord Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980) (Weinfeld, J.), *aff'd*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983). Under this reasoning, then, the mere fact that NNPC agreed to an alternate venue of Paris, France for the arbitration, does not mean that it waived its immunity to jurisdiction in the United States.

Courts in this Circuit as well as the Third have held to this strict interpretation of waiver, while the D.C. Circuit has been more liberal. *See, e.g., M.B.L. Int'l Contractors, Inc. v. Republic of Trinidad and Tobago*, 725 F. Supp. 52, 54 n.3 (D.D.C. 1989) (Republic of Trinidad and Tobago as signatory under New York Convention had impliedly waived its immunity to jurisdiction; court noted opposing view of the Second Circuit). This Court declines to follow the more liberal interpretation of the D.C. Circuit, especially on the facts of this case.

The Court declines at this time to make a finding on the issue of sovereign immunity. The determination of this issue requires that the Court either accept or reject the findings of the arbitrator. As will be discussed below, however, these proceedings will be stayed pending the results of the Nigerian proceedings. The Court notes, however, that NNPC does not have contacts with the United States, and its commercial activities have no direct effect in the United States. The contract at issue involved the sale of Nigerian crude oil f.o.b. Nigeria with title to the crude and any risk of loss passing to the buyer in Nigeria. The negotiation and execution of the contract occurred in Nigeria and Nigerian law was to govern any dispute. It is more probable than not that NNPC did not contemplate that disputes concerning the contract at issue would be resolved in a United States court.

II. *Stay Pending Outcome in Nigeria*

NNPC requests that the proceedings in this Court should be stayed pending a determination by the High Court in Lagos, Nigeria, pursuant to Article VI of the Convention, which provides as follows:

> If an application for the setting aside or suspension of the award has been made to a competent authority [in the country where the award was rendered], the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award . . . and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

In *Spier v. Calzaturificio Tecnica S.P.A.*, 663 F. Supp. 871 (S.D.N.Y. 1987), Judge Haight was faced with a similar request to stay enforcement proceedings pending the outcome of a challenge made to an award issued in Italy, which challenge was pending before an Italian court. Judge Haight, noting that "jurisprudence in the United States" was scant on this issue, stated that "the remedy is discretionary with the district courts." 663 F. Supp. at 874. In determining that a

stay was proper in the case before him, Judge Haight stated as follows:

> The positions of the parties in the case at bar are entirely predictable. Spier condemns Tecnica's Italian litigation as frivolous and intended solely for the purpose of harassment and delay. Tecnica says that its challenges under Italian law to the award are meritorious and will undoubtedly prevail. One would be astonished if trial counsel for either party in this country said anything else.

663 F. Supp. at 875. Judge Haight granted the stay, and indicated that he would deny the stay "only if [he] were satisfied that Tecnica's litigation position in Italy was transparently frivolous." Unable to come to such a conclusion, he determined that it was preferable to permit an Italian tribunal to construe Italian law than to have an American court "apply the law of the foreign country where the award was made, and enter[ ] an order enforcing an award later condemned by the courts of that foreign country." *Id.* The same logic applies in this case, especially where the evidence indicates that the arbitrators may not have considered all of the evidence before them.

The Petitioner argues, however, that this Court can find that the proceedings instituted by NNPC in Nigeria are patently frivolous. Despite NNPC's statement that it immediately contacted its solicitors in Nigeria after receiving the award, on April 3, 1990, NNPC sent a letter to its arbitrator with a check in the amount of the deposit toward fees requested by the arbitrators. In that letter and in a subsequent letter dated April 10, 1990, NNPC sought a reduction in fees, but made no further complaint. Petitioner states that nothing else happened until June 26, 1990, when a three page "Originating Summons" was served on Petitioner. This, Petitioner alleges, is a "knee-jerk" reaction to receipt of the Notice of Petition to Confirm the Arbitration award served on NNPC on June 25, 1990. The Petitioner contends further that still nothing substantive has happened in the Nigeria action, while the arbitrators have submitted "Counter Affi-

davits" in the instant proceeding which refute the allegations made by NNPC in the action in Nigeria.

Petitioner cautions the court that NNPC is at a great advantage before the High Court in Nigeria, because "Nigeria is not a democratic country but is ruled by the military and its principal foreign asset earner is NNPC." Matthew Aff. ¶ 29. Petitioner also states that considerable damage is being sustained by it at this time due to the invasion of Kuwait by Iraq. Petitioner estimates that its damages now exceed $450 million. In addition, Petitioner fears that large amounts of money could be withdrawn from the United States by NNPC, and Mr. Matthew believes that it would be "physically unsafe for [him] as president of CTFC to go to Nigeria." Matthew Aff. ¶ 37.

The Court finds that the dispute should be resolved by the High Court in Lagos, Nigeria. NNPC's objections to the arbitration award are far from frivolous and deserve judicial attention. The contract is governed by the law of Nigeria, and the Nigerian courts are better equipped than this Court to determine the proper application of that law. Finally, Petitioner's fears of receiving unfavorable treatment in the Nigerian courts are belied by the treatment it has received thus far. Petitioner has objected to the service of process in the Nigerian proceedings and has been granted extensions of time by that court. Wild accusations made without any basis in fact are of little persuasive value to the Court.

Petitioner requests that the Court require NNPC to post security with interest and allowable costs and fees. The required security should be, according to Petitioner, at least $450,000,000.00. In response, NNPC notes that Petitioner has not sought to amend its petition to allege this amount and that this underscores the "absurdity of petitioner's claim that an undercapitalized and essentially assetless paper corporation was a party to a long-term crude oil sales contract with the national oil corporation of a major OPEC oil producing state." NNPC Reply Mem. at 17. NNPC urges the Court to require security in the amount stated in the petition's prayer for relief. The Court agrees with NNPC, and finds Petitioner's request for security to be outrageous. Accordingly,

NNPC is required to post security in the amount of $10,255,728.80, the amount set forth in the arbitration award and the amount demanded in the Petition, pending the outcome of the proceedings before the High Court in Lagos, Nigeria.[1] The security is to be maintained at the standard rate of interest, and Petitioner's request for costs and fees is denied.

Conclusion

NNPC's motion to stay the proceedings in this Court pending the outcome of the proceedings before the High Court in Lagos, Nigeria, is granted. NNPC is to post security with the Clerk of the Court in the amount of $10,255,728.80. This action is to be placed on this Court's suspense calendar, and the parties are to advise the Court of the status of the Nigerian proceedings by March 29, 1991.

SO ORDERED.

Dated: New York, New York
December 18, 1990

/s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

1 The Court having stayed the proceedings before it, the additional issues raised by both parties will not be addressed at this time. In any event, several of the issues raised are more properly presented to the Nigerian court, such as the need for additional discovery and complaints about service of process.

Opinion of the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4169 (JFK)

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Petitioner,

—against—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent.

MEMORANDUM OPINION
AND ORDER

APPEARANCES: For the Petitioner:
Poles, Tublin, Patestides & Stratakis
New York, New York
Of Counsel: Melvin J. Tublin, Esq.
Michael O. Hardison, Esq.

Lord Day & Lord, Barrett Smith
New York, New York
Of Counsel: Gerald A. Novack, Esq.
Thomas J. Curran, Esq.

For the Respondent:
Joseph D. Pizzurro, Esq.
Curtis, Mallet-Prevost, Colt & Mosle
New York, New York

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Respondent Nigerian National Petroleum Corporation ("NNPC") seeks reconsideration of this Court's Opinion and Order dated December 18, 1990. Fed. R. Civ. P. 59(e), Local Rule 3(j).

Background

In its December 18, 1990 decision, the Court denied the application of Petitioner Caribbean Trading and Fidelity Corporation ("CTFC") for an order confirming an arbitration award in its favor. The Court instead granted NNPC's motion for a stay of the confirmation proceedings pending the outcome of proceedings before the High Court in Lagos, Nigeria. NNPC was directed to post security with the Court in the amount of the petition's prayer for relief, $10,255,728.80. The action then was placed on the Court's suspense calendar and the parties were advised to notify the Court of the status of the Nigerian proceedings by March 29, 1991.

Although the facts of this case are set forth in detail in the December decision, portions will be reiterated for purposes of this discussion. The dispute between NNPC and CTFC concerns a contract for the sale and purchase of Nigerian crude oil. Central to the parties' dispute is the identity of the contracting parties. NNPC argues that it contracted with the Government of St. Christopher and Nevis ("St. Kitts"), through Petitioner as an agent for St. Kitts. Pursuant to Respondent's interpretation of the contract, it is a government-to-government contract. Petitioner argues, however, that the contract does not refer to St. Kitts, but only to CTFC, a private entity. Petitioner therefore interprets the contract as a government-to-private entity contract.

The contract provides for arbitration of disputes pursuant to the Nigerian Arbitration Act, Cap. 13 of the 1958 Revised Edition of the Laws of the Federation of Nigeria. A dispute arose between the parties, and arbitration was mutually

agreed upon. Each party appointed an arbitrator. The arbitrators held two days of hearings on the contract dispute and rendered their written award on March 28, 1990, in favor of Petitioner. The award provides that NNPC is to provide CTFC with a total of 4,110,000 barrels of oil, and $10,255,728.80 at 20% interest. In addition, the award states that NNPC's notice of termination of contract dated July 29, 1988, is to be declared null and void and to no effect. Finally, the arbitrators awarded themselves fees in the amount of $596,879.00.

The Court considered the facts presented by each of the parties in support of their respective arguments, and concluded as follows. First, the Court determined that a central issue of Respondent's jurisdictional immunity argument was the identity of the contracting party. The arbitrators had determined that CTFC, a private entity, had contracted with NNPC. That decision, however, presently is on appeal before the High Court in Lagos, Nigeria. The Court declined to make a finding on the issue of sovereign immunity, finding that such a determination would require the Court either to accept or reject the findings of the arbitrators. The Court instead stayed the proceedings pending before it in order to avoid a result inconsistent with that issued by the High Court in Lagos, Nigeria.

Discussion

Motions for reargument are governed by Local Rule 3(j), which provides in pertinent part as follows:

> There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked.

See also Weissman v. Fruchtman, 124 F.R.D. 559, 560 (S.D.N.Y. 1989); *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988).

Respondent bases its motion for reargument on the ground that the Court erred in declining to determine the issue of subject matter and personal jurisdiction and should not have reached the issues arising under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), including the question of whether a stay should be issued under Article VI of the Convention and any security posted in connection therewith. (Respondent's Mem. at 2).

As to the issue of the stay, the Court has not been presented with any "controlling decisions which counsel believes the court has overlooked." (Local Rule 3(j)). Rather, Respondent has taken this opportunity to reiterate its arguments previously entertained and discussed at length by the Court. The Court took into full consideration each of the cases and statutes cited by Respondent and made its determination accordingly. The Court finds no basis for granting the motion for reargument concerning the stay.

The issue of the Court's order directing that security be posted by Respondent was not fully briefed on the initial motion. On this motion, Respondent contends that

> "[r]equiring NNPC to post security in advance of a determination of the jurisdictional issues and in advance of a determination on the merits of the petition would be tantamount to granting petitioner a pre-judgment attachment without the consent of NNPC in violation of the express provisions of the [Foreign Sovereign Immunities Act ("FSIA")] governing pre-judgment attachments against foreign states. 28 U.S.C. §§ 1609, 1610(d). Under those provisions the property of a foreign state is immune from pre-judgment attachment in the absence of an express waiver of such immunity. The prohibition against pre-judgment attachment applies with equal force to other forms of pre-judgment restraint on the property of a foreign state. *See S. & S. Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir.), *cert. denied*, 464 U.S. 850 (1983) ("The FSIA would become meaningless if courts could eviscerate its protections

> merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property.").

(Respondent's Mem. at 5). This argument is posed for the first time by Respondent in the instant motion to reargue. In its reply brief on the initial motion, when faced with Petitioner's request that security be posted by NNPC in the amount of $450 million, Respondent merely stated,

> "Petitioner has not even attempted to amend its petition to seek those damages. Furthermore, there is absolutely no substantiation for any claim that petitioner would be entitled to that amount if its petition were granted. This inflated amount only serves to underscore the absurdity of petitioner's claim that an undercapitalized and essentially assetless paper corporation was a party to a long-term crude oil sales contract with the national oil corporation of a major OPEC oil producing state."

(Respondent's Reply Mem. dated November 16, 1990, at 17). At no time did Respondent indicate that an order requiring it to post any amount of security would in any way violate the FSIA. That issue, therefore, was not properly before the Court on the initial motion and may not for the first time be raised on a motion for reargument. *See Andros Compania Maritima v. Intertanker Ltd.*, 1989 U.S. Dist. LEXIS 12856 (S.D.N.Y. Oct. 31, 1989) (citations omitted); *Weissman*, 124 F.R.D. at 560.

In response to Respondent's motion to reargue, Petitioner attempts to obtain a favorable ruling on its motion to confirm the arbitration award. The Court declines, however, to disturb its decision of December 1990, and will await the outcome of the proceedings pending before the High Court in Lagos, Nigeria, before reaching the merits of the parties' claims.

Conclusion

The Court denies Respondent's motion to reargue. The Court's decision of December 18, 1990, remains in full force and effect. The parties are to advise the Court of the status of the Nigerian proceedings by June 3, 1991.

SO ORDERED.

Dated: New York, New York
April 17, 1991

/s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NUMBER 91-7445

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 9th day of December, one thousand nine hundred and ninety-one.

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Plaintiff-Appellee,

—v.—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant NIGERIAN NATIONAL PETROLEUM CORPORATION

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT of APPEALS
For the
SECOND CIRCUIT

91-7445

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of October, one thousand nine hundred and ninety-one.

PRESENT: HON. RALPH K. WINTER
HON. FRANK X. ALTIMARI
HON. J. DANIEL MAHONEY

Circuit Judges,

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Petitioner-Appellee,

—v—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the order of said district court be and it hereby is dismissed for lack of jurisdiction in accordance with the opinion of this court. Treating

the appeal as a writ of mandamus, the petition be and it hereby is denied.

ELAINE B. GOLDSMITH, Clerk
By: /s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

/s/ Elaine B. Goldsmith
Clerk

ISSUED AS MANDATE Jan. 14, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4169 (JFK)

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Petitioner,

—against—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent.

ORDER

JOHN F. KEENAN, United States District Judge:

Respondent Nigerian National Petroleum Corporation ("NNPC") seeks a stay of this Court's Opinion and Order dated December 18, 1990, which directed NNPC to post security in the amount of $10,255,728.80. NNPC has filed an appeal of this Court's decision and argues that requiring it to post security is inconsistent with the express terms of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"). NNPC argues as well that the Court's order will impose a hardship upon NNPC, due to the need to obtain specific authorization from an executive council within the Nigerian government in order to post the security. Finally, NNPC contends that should it be "unable and/or unwilling to comply" with the Court's order, "there is substantial doubt as to whether the Court may hold NNPC in contempt for failure to comply with the order." (Joseph D. Pizzurro Letter to the Court dated May 2, 1991, at 3). For these reasons, NNPC contends that a stay is warranted in this case.

The Court declines to grant NNPC's motion for a stay. An arbitration award in the amount of the security ordered was

rendered against NNPC on March 28, 1990. In addition, NNPC has been aware of the Court's pending order since December of 1990. The "hardship" imposed upon NNPC requiring the need for specific authorization from an executive council within the Nigerian government could have been precluded by NNPC by setting the authorization process in motion long ago. Even though NNPC filed a motion to dismiss the petition to confirm the arbitration and a motion to reargue the Court's December 1990 order, there was no reason for it to delay obtaining authorization from the Nigerian government in order to comply first with the arbitrators' order and second with this Court's order. Finally, should the Court's order be found to violate the FSIA, the security posted promptly will be returned to NNPC with interest.

NNPC's motion for a stay of the Court's December 1990 order is denied.

SO ORDERED.

Dated: New York, New York
May 21, 1991

/s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

91-7445

CARIBBEAN TRADING AND FIDELITY CORP.,

Appellee,

—against—

NIGERIAN NATIONAL PETROLEUM CORP.,

Appellant.

NOTICE OF MOTION

Stay Pending Appeal

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of the case)

Joseph D. Pizzurro, Esq.
Curtis, Mallet-Prevost, Colt & Mosle
101 Park Avenue
New York, New York 10178-0061
(212) 696-6000

Has consent of opposing counsel:

A. been sought?	X Yes	___ No
B. been obtained?	___ Yes	X No
Has service been effected?	X Yes	___ No
Is oral argument desired? (Substantive motions only)	X Yes	___ No

Requested return dated: June 11
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? _X_ Yes ____ No

B. by firm date of argument notice? ____ Yes _X_ No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

Hon. John F. Keenan, U.S.D.J.

Brief statement of the relief requested:

Stay pending appeal of the order requiring appellant, a foreign state, to post prejudgment security.

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

Gerald A. Novack, Esq.
Lord, Day & Lord, Barrett Smith
1675 Broadway
New York, New York 10019
(212) 969-6352

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? _X_ Yes ____ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ____ Yes _X_ No

If No, explain why not:

If a stay is not granted, appellant will have had its right to be free of any prejudgment restraint on its assets.

Will the parties agree to maintain the status quo until the motion is heard? ____ Yes _X_ No

Complete Page 2 of This Form

By: (Signature of attorney)	Appearing for: (Name of party)	Appellant or Petitioner:
/s/ Joseph D. Pizzurro Signed name must be printed beneath Joseph D. Pizzurro	Nigerian National Petroleum Corp.	___ Plaintiff X Defendant

ORDER

Kindly leave this space blank

Before: Hon. Wilfred Feinberg, Hon. Jon O. Newman, and Hon. Ralph K. Winter, C.JJ.

IT IS HEREBY ORDERED that the motion be and it hereby is granted. The appeal is expedited. Appellants brief and appendix having been filed, the appellee agrees to file its brief by June 18, 1991. The appeal shall be set for oral argument at the first available date.

ELAINE B. GOLDSMITH, Clerk

/s/ Edward J. Guardaro

June 11, 1991
Date

By: Edward J. Guardaro
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

91-7445

CARIBBEAN TRADING AND FIDELITY CORP.,

Petitioner-Appellee,

—against—

NIGERIAN NATIONAL PETROLEUM CORP.,

Respondent-Appellant.

NOTICE OF MOTION

Stay of Mandate Under F.R.A.P. 41(b)

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of the case)

Joseph D. Pizzurro, Esq.
Curtis, Mallet-Prevost, Colt & Mosle
101 Park Avenue
New York, New York 10178-0061
(212) 696-6000

Has consent of opposing counsel:

A. been sought?	X Yes	____ No
B. been obtained?	____ Yes	X No
Has service been effected?	X Yes	____ No
Is oral argument desired? (Substantive motions only)	X Yes	____ No

Requested return dated: December 24, 1991
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ____ Yes X No

B. by firm date of argument notice? ____ Yes X No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

Brief statement of the relief requested:

Stay of mandate pending appeal to the United States Supreme Court.

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

Gerald A. Novack, Esq.
Lord, Day & Lord, Barrett Smith
1675 Broadway
New York, New York 10019
(212) 969-6352

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ____ Yes X No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ____ Yes X No

If No, explain why not:

Appellant seeks a stay of this court's mandate pending appeal to the Supreme Court.

Will the parties agree to maintain the status quo until the motion is heard? ____ Yes X No

Complete Page 2 of This Form

By: (Signature of attorney)	Appearing for: (Name of party)	Appellant or Petitioner:
/s/ Joseph D. Pizzurro Signed name must be printed beneath Joseph D. Pizzurro	Nigerian National Petroleum Corp.	___ Plaintiff X Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

December 20, 1991
Date

/s/ Francis X. Altimari
Circuit Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

January 7, 1992

Mr. Joseph D. Pizzurro
101 Park Avenue
New York, NY 10178-0061

Re: Nigerian National Petroleum Company, v. Caribbean Trading and Fidelity Corporation
Application No. A-481

Dear Mr. Pizzurro:

The application for a stay of mandate of the U.S. Court of Appeals for the Second Circuit pending timely filing and disposition for a petition for writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on January 7, 1992 endorsed thereon the following:

"1/7/92
Deny
CT"

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 4169 (JFK)

CARIBBEAN TRADING AND FIDELITY CORP. LTD.,

Petitioner,

—against—

NIGERIAN NATIONAL PETROLEUM CORP.,

Respondent.

ORDER

JOHN F. KEENAN, United States District Judge:

Before the Court is respondent's request that it be granted permission to post a letter of credit in satisfaction of this Court's December 18, 1990 Opinion and Order directing it to post $10,255,228.80 in security. The Court has carefully considered the arguments counsel have made in their series of letters and during the January 21, 1992 conference convened to address the issue, and finds as follows.

A letter of credit will not provide adequate protection. Therefore, respondent is directed to post security in the form of cash or a surety bond by February 3, 1992. If respondent elects to post cash, it shall post $10,255,228.80 in cash with the Clerk of the Court, who will place the funds in an interest-bearing account. If respondent elects to post a surety bond, it shall post a bond in the amount of $12 million to cover both the amount of the potential judgment and a reasonable reserve to cover interest. *See Nippon Emo-Trans Co. v. Emo-Trans Inc.*, 744 F. Supp. 1215, 1236-37 (E.D.N.Y. 1990).

SO ORDERED.

Dated: New York, New York
January 27, 1992

/s/ John F. Keenan
JOHN F. KEENAN, U.S.D.J.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

28 U.S.C. § 1603(a) and (b)

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1609

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610(d)(1)

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver.

UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

9 U.S.C. § 201

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Rule 59(e)

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

LOCAL RULES OF THE SOUTHERN DISTRICT OF NEW YORK

Civil Rule 3(j)

(j) A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion and shall be served at least the same number of days before the return day as was required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court.

UNITED STATES CODE, JUDICIARY AND JUDICIAL PROCEDURE

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

(2)

No. 91-1432

Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Petitioner,

vs.

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

GERALD A. NOVACK
Counsel of Record
1675 Broadway
New York, New York 10019-5874
(212) 969-6352

Counsel for Respondent Caribbean Trading and Fidelity Corporation

LORD DAY & LORD,
BARRETT SMITH

CAROL D. QUACKENBOS
Of Counsel

April 8, 1992

QUESTIONS PRESENTED

1. Whether the district court may promulgate a local rule requiring that all arguments in opposition to a motion be timely raised before the motion is submitted and decided, and not be raised for the first time on a motion for reconsideration of the decision?

2. Whether the settled rule that an interlocutory order requiring the posting of security is not immediately appealable should be disregarded merely because the party required to post security is an agency of a foreign state?

STATEMENT PURSUANT TO RULE 29.1

Respondent Caribbean Trading and Fidelity Corporation has no parent companies or subsidiaries.

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STATEMENT OF THE CASE

Respondent Caribbean Trading and Fidelity Corporation ("CTFC"), appellee below, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Petitioner Nigerian National Petroleum Corporation ("NNPC") seeking review of the opinion of the Court of Appeals entered on October 30, 1991 (the "Petition").

A. Proceedings In The District Court

The Court of Appeals decision affirmed an April 17, 1991 order of the United States District Court for the Southern District of New York (Hon. John F. Keenan) denying a motion for reconsideration of his earlier order, issued in December 1990, requiring NNPC to post security of $10,255,728.80

pending the outcome of related proceedings in Nigeria. The December 1990 order arose out of a petition brought by CTFC to confirm and enforce an arbitration award rendered in CTFC's favor against NNPC in Nigeria in March 1990. Enforcement of the award is sought pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208 (1970) (the "Convention").

In October 1990, NNPC had moved to dismiss CTFC's petition on various grounds. NNPC also argued that if CTFC's petition were not then dismissed, the enforcement action should be stayed pending resolution of NNPC's challenge to the award in the courts of Nigeria. NNPC based its request for a stay on Article VI of the Convention, which

expressly provides that the district court, upon granting a stay, may order the party resisting enforcement of the award to "give suitable security." (See App. A-47.)[1]

In response to NNPC's request for a stay, CTFC urged that if such a stay were granted NNPC should be required to post security in an amount sufficient to cover the damages specified in the award and the additional damages that had accrued since entry of the award. In its reply papers NNPC did not challenge the district court's power to require the posting of such security. Rather, NNPC argued only that the amount of security sought by CTFC was too high.

On November 26, 1990, the district court heard oral argument in connection with the pending motions. At

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[1] References to the Appendix to the Petition are indicated as "App. ___."

oral argument CTFC's counsel reiterated the request for security and NNPC repeated its earlier argument that the amount sought was too high. At no time before or during oral argument, however, did NNPC contend that an order requiring the posting of security constituted a "prejudgment attachment," within the meaning of section 1609 of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), which prohibits prejudgment attachments against foreign states unless, in accordance with section 1610(d)(1) of the FSIA, the foreign state has "explicitly waived" its immunity from such attachment.[2]

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[2] Section 1609 of the FSIA provides that the property of a foreign state shall be immune from prejudgment attachment except where, as provided by section 1610(d), the foreign state has explicitly waived its immunity and the attachment is necessary to secure satisfaction of a judgment. See 28 U.S.C. §§ 1609, 1610(d)(1), reproduced at App. A-46.

On December 18, 1990, the district court issued its order staying the enforcement action pending the outcome of the related proceedings in Nigeria. (App. A-12 -- A-25.) That order also required NNPC to post security with the Clerk of the Court in the amount of $10,255,728.80. (See App. at A-24 -- A-25.)

Thereafter, NNPC moved for reconsideration of the December 1990 order. NNPC's motion was made pursuant to Civil Rule 3(j) of the Local Rules of the Southern District of New York (see App. at A-49), which requires that the motion set forth the "matters or controlling decisions which counsel believes the court has overlooked." On the motion for reconsideration, NNPC argued for the first time that: (a) an order requiring the posting of security as part of a stay was tantamount to the

issuance of a prejudgment attachment; (b) NNPC had not explicitly consented to any such attachment; and (c) the December 1990 order therefore violated section 1609 of the FSIA.

By order dated April 17, 1991, the district court denied NNPC's motion for reconsideration and declared that its earlier order remained in full force and effect. (App. A-26, A-31.) The district court held that under Local Rule 3(j) NNPC's argument that it was immune from prejudgment attachment could not be asserted for the first time on a motion for reconsideration. (App. A-30.)

B. Proceedings In The Court of Appeals

The majority of the Second Circuit panel held that NNPC's appeal from the district court's April 17, 1991 order should be dismissed for lack of jurisdiction. The basis for this

holding was the well-settled rule that orders requiring the posting of security are not immediately appealable. (App. at A-4 -- A-7.)[3] As the majority explained, orders requiring the posting of security do not present an exceptional circumstance warranting immediate appellate review because such orders "generally cause no irreparable loss in that parties posting security will be repaid with interest if they prevail." (App. at A-5.)

The majority rejected NNPC's contention that this order was immediately appealable on NNPC's theory that it was analogous to cases involving

---

[3] The majority opinion noted that "doubt exists" as to whether an order under the Convention requiring the posting of security as part of a stay constitutes an "attachment" within the meaning of the FSIA, but nevertheless assumed for purposes of the appeal that the order appealed from fit within the definition. (App. at A-6.)

claims of immunity from suit, which are immediately appealable. (App. at A-5 -- A-6.) Claims of immunity from suit, the majority observed, implicate a party's right to be free from the expense and burden of defending a case. A later ruling, after trial, that such immunity existed will not redress this injury. In contrast, the wrongful denial of a claim of immunity from prejudgment attachment can be remedied by the repayment of the security, with interest. For this reason the majority perceived "no reason to distinguish for purposes of appellate review between an order granting security that is erroneous on the merits and an identical order that is issued in the face of a statute such as the FSIA stating that a party is 'immune' from such an order." (App. at A-7.)

Treating the appeal as a petition for mandamus, the panel unanimously agreed that the petition should be denied on the narrow ground that the district court had properly refused to consider the merits of NNPC's new argument because it was raised for the first time on a motion for reconsideration. (App. at A-7 -- A-8, A-11.)

The Court of Appeals rejected NNPC's argument that Local Rule 3(j) was somehow violative of the FSIA because the Rule required NNPC to assert its section 1609 defense in a timely manner. Observing that this defense does not go to the subject-matter jurisdiction of federal courts, the Court of Appeals rejected NNPC's contention that it was free to raise it at any time:

> We believe that the applicability and effect of Section 1609 are not matters, like subject-matter jurisdiction, that may be

> raised at any time by a foreign state. We therefore believe that a district court may require a foreign state to invoke Section 1609 in its initial response to the opposing party's request for an order of attachment, and the court may reject as untimely any later assertion of Section 1609's prohibitions. This wholly procedural rule does not infringe on the prerogatives of a foreign state under the FSIA. It merely imposes orderly procedures upon the assertion of those prerogatives. Judge Keenan's refusal to address the merits of NNPC's belated invocation of Section 1609 was thus neither a usurpation of power nor a clear abuse of discretion. Treating the appeal as a petition for a writ of mandamus, we deny the petition. (App. at A-8.)

REASONS FOR DENYING THE WRIT

1. The Decision Below Turns Upon A Local Procedural Rule

Petitioners contend that the Second Circuit's decision violates the express terms of the FSIA and creates a conflict in the circuit courts. Petition at 9. Neither of these arguments has merit.

All that is involved in this case is the interpretation of a local procedural rule governing when a party must present its arguments on a motion. The Court of Appeals went out of its way to observe that its decision "is not a ruling, of course, that anything NNPC did amounted to an explicit waiver pursuant to section 1610(d)(1)" of the FSIA, but was only a "ruling that the section 1610(d)(1) defense was not timely asserted." (App. at A-11.) Thus, NNPC's urgings that the decision below has "in one stroke ... swept away the FSIA's immunity provision and reinstated the availability of prejudgment attachment which Congress so carefully and specifically eliminated" (Petition at 14) is nothing more than empty rhetoric.

The Second Circuit's decision does not implicate any far-reaching concerns

involving a court's jurisdiction to order prejudgment attachment of a foreign sovereign's assets. The legal principle set forth by the Second Circuit -- that, with regard to matters not involving subject-matter jurisdiction,[4] a foreign state must abide by a procedural rule requiring that such matters be raised in a timely fashion -- is hardly remarkable. Moreover, given the unusual facts of

---

[4] The subject-matter jurisdiction of the district court derives from 28 U.S.C. § 1330(a), which provides that the district court shall have subject-matter jurisdiction of claims "with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." (Emphasis added.) NNPC's claim of immunity from prejudgment attachment rests on section 1609, not sections 1605-1607. Accordingly, it is clear that the subject-matter jurisdiction of the district court is in no way dependent upon a showing that the "explicit" waiver requirement of sections 1609 and 1610(d)(1) have been satisfied.

this case, the decision is unlikely to have wide application.

NNPC's argument is that the "explicit" waiver requirement permits it to raise an objection to an attachment, at any stage of the proceedings, even if NNPC repeatedly has failed to raise such an objection at earlier opportunities. NNPC has cited no authority for this proposition and it is unlikely that Congress intended to permit a foreign sovereign to engage in such litigation tactics.

Finally, NNPC's claim of a conflict in the circuits is without foundation. The decisions cited by NNPC consider what conduct constitutes an "explicit waiver." (See Petition at 14-16.) NNPC has not cited a single case which has considered whether a local rule may require a party to assert a section 1609 defense at the time when

a motion is made to require the posting of security in connection with a stay. Since the decision below does not offer any view as to what conduct would constitute such an "explicit waiver," it obviously cannot be in conflict with the decisions noted by NNPC.

2. **The Ruling On Appealability Does Not Warrant Review**

NNPC asserts that the Court should grant certiorari to "resolve the conflict and dispel the confusion concerning the appealability of district court denials of immunity claims." (Petition at 18.) There is no such conflict or confusion.

NNPC acknowledges that neither this nor any other court has ruled on the question whether a claim to immunity from prejudgment attachment under the FSIA is immediately appealable. (See

Petition at 16-17.) All of the cases NNPC cites deal with denials of claims to jurisdictional immunity, that is, the right to be free from suit. (See Petition, at 16-17.) NNPC has not pointed to a single case which has <u>even considered</u> the appealability question presented here, much less ruled on it. Contrary to NNPC's urgings, there is no confusion or conflict, and certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: April 7, 1992

Respectfully submitted,

Gerald A. Novack
Counsel of Record
1675 Broadway
New York, NY 10019
(212) 969-6000
Counsel for
Caribbean Trading and
Fidelity Corporation

LORD DAY & LORD,
BARRETT SMITH

Carol D. Quackenbos

Of Counsel